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SUPREME COURT, U.S.

No. 08-1309

IN THE

SUPREME COURT OF THE UNITED STATES

HILL DERMACEUTICALS, INC.,
Petitioner,

v.

Rx SOLUTIONS, UNITED HEALTH GROUP, INC., and UNITED HEALTHCARE OF FLORIDA, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF REPLY ARGUMENT

The Petitioner requests the Court to disregard and not be swayed, or persuaded otherwise, from granting the Petition for Writ of Certiorari based upon the Brief in Opposition filed by the Respondents. Their Brief is not only ingenuous in its approach, but misstates the law and inaccurately sets forth legal arguments to this Court.

1. The Respondents' attempt to mislead the Court by making an unsupported and inaccurate statement that there is no direct conflict within the Circuit Courts of Appeal, or any inter and/or intra-circuit conflicts with regard to the first served and last served rule for removal.

2. Respondents seem to rely upon an ill-conceived approach that since 1999 there has been no conflict of circuit court opinions as to whether the first served rule applies, or the last-served rule. This is a patently erroneous argument based upon either Respondents' failure to adequately research the issue, or a decision not to adequately research the law. In fact, since 1999 the Circuit Courts have either inconsistently decided the issue, have affirmatively decided to make no decision, or created an intermediate rule out of the first served or last served doctrine.

3. Respondents' contention that *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) resolved the issue of first served or last served defendant under the removal statutes in 1999, and that is the reason there is no conflict between the Circuit Courts of Appeal is clearly misplaced. In fact, *Murphy Brothers* has absolutely nothing to do

with the issue presented in the Petition for Writ of Certiorari. The *Murphy Brothers* case of what is service to start the 30-day clock running under the removal statutes was less in conflict and uncertainty for certiorari purposes than the issue presented in Hill's Petition.

4. Respondents' argument would create an untenable precedent in which a plaintiff is prejudiced by an unlimited amount of potential removals that could occur in a case, which in essence would allow any defendant to remove up to one year at any point in time once they are served, irrespective of the fact that a federal court, as in the subject case, actually had once remanded the first served removal jurisdiction back to the state court. Respondents cited no case, nor can they, in which the last served rule is supported by the egregious and gross factual Record before this Court where at the behest of the first served defendant, who removed the case to federal court, moved to dismiss the complaint claiming, *inter alia,* the ultimate last served defendant (its parent company) must be added, then the complaint is amended while a motion for remand is pending and the removing Respondents do nothing in response to that Motion. Then, the case is remanded to state court. After the parent company of the first served removing defendants is subsequently served in state court it then removes the case, and that same federal court "upon reconsideration", which earlier had said such a reconsideration was improper, denied Hill's Second Motion for Remand. The Eleventh Circuit was incorrect in grafting this gross factual situation onto what is now an unlimited "universe" of the last served defendant rule for purposes of removal to federal court.

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE PER RULE 29.6

1. Plaintiff, Hill Dermaceuticals, Inc., a Florida corporation, a 100% owned privately held closed corporation. No public corporation owns 10% of more of the stock of Hill Dermaceuticals, Inc.
2. Jerry S. Roth (principal stockholder in Hill Dermaceuticals, Inc.)
3. Susan G. Roth (principal stockholder in Hill Dermaceuticals, Inc.)
4. Larry M. Roth, Esquire, attorney for Petitioner and a Member of the Supreme Court Bar.
5. United Healthcare of Florida, Inc., a wholly-owned subsidiary of United Healthcare, Inc., which is then a wholly-owned subsidiary of United HealthCare Services, Inc. United Healthcare Services, Inc. is, finally, a wholly-owned subsidiary of United Health Group Incorporated, a publicly-traded company, and Respondent (last served defendant).
6. Rx or Prescription Solutions is a wholly-owned subsidiary of PacifiCare Health Systems, LLC, which in turn is a wholly-owned subsidiary of United Health Group Incorporated, the Respondent (last served defendant).
7. United Health Group Incorporated, a publicly-traded company.
8. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.A., attorneys for Respondents

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ARGUMENT

The Respondent's Opposition to Hill Dermaceuticals, Inc.'s (hereinafter "Hill") well founded Petition for Writ of Certiorari should be outright rejected, and not in any way entertained as persuasive either on the facts or the law. There are several compelling reasons for this. It is unclear to Hill as to how Respondents can make certain of the contentions in their Brief in Opposition, sparse as it is, both in fact and in law. Nevertheless, Hill submits that Respondents have disingenuously made their arguments in opposition by, in essence, not adequately and fully researching the issues of law and the extensive existence of the conflict jurisdiction which must motivate this Court to accept the Petition. Further, for whatever reason, Respondents misstate the law in terms of the number of conflict decisions within the various circuits on the first served and last served rule. Finally, Respondents go out of their way to ignore the egregious set of the subject facts which, even if this Court were to adopt as a general proposition applicable to all Circuit Courts that the last served defendant rule applies, the circumstances of this case would provide an almost unlimited amount of times, a second bite at the apple, and other similar egregious sets of circumstances in which a defendant might be able to remove a case to federal court despite the general rule of law that the plaintiff's choice of forum should be held persuasive and, at a minimum, the removal statutes strictly interpreted.

First, the Respondents raise an argument at page 5 that "since 1999" in essence the rule as to the first and last served defendants for purposes of removal has been a resolved issue. Respondents chide Hill for not citing any post-1999 cases. It is the position of Hill, as a basis for this Court to grant jurisdiction, that only 5 of the 11 Circuits have definitively determined whether or not the first served defendant, or the last served defendant rule applies, or some amalgam position between the two. Some Circuits

have specifically declined to decide at all. When this has occurred there has been intra-circuit conflict at the District Court level. There is no uniformity on this issue.

The lack of credibility in Respondents' Brief in Opposition can be seen from the following survey of cases (since 1999) which clearly demonstrate that there is non-uniformity and conflict within the circuits:

First Served Defendant v. Last Served Defendant v. Intermediate Position (*"McKinney"*)

1. D.C. Circuit: Undecided.

Recent cases suggest a trend towards the Intermediate (McKinney) rule. *See Princeton Running Co., Inc. v. Williams,* Civil Action No. 05-1461 (PLF) 2006 WL 2557832 (D.D.C. September 5, 2006)("Our circuit not having addressed this issue, the Court concludes that the *McKinney* intermediate rule is the best reasoned interpretation and application of Section 1446(b), as it is both fair to the later-served defendant and less prejudicial to plaintiffs—without giving the earlier-served defendants an underserved second bite at the apple.")

2. 1st Circuit: Undecided, but probably leaning to First-Served Defendant Rule.

See, e.g.: Davidson v. Rand, No. Civ. 05-CV-012-SM, 2005 WL 768593 (D.N.H. April 6, 2005) (outstanding reasoning rejecting last-served defendant rule); *Gorman v. Abbott Laboratories,* 629 F. Supp. 1196, 1201 (D.R.I. 1986); *Hill v. Phillips, Barrett, Kaiser Eng'g Ltd.,* 586 F. Supp. 944 (D.Me. 1984); *Sager v. Wante,* No. 95-524-M (DNH Nov. 30, 1995). *See also, In re Pharmaceutical Industry Average Wholesale Price Litigation,* 307 F. Supp. 2d 190, 194 (D.Mass. 2004)(in discussing first-served and last-served defendant rules argued by parties, stated that "the First Circuit has not adopted either rule") (emphasis added)

3. 2d Circuit: Undecided.

See, e.g.: Village of Chestnut Ridge v. Town of Ramapo, No. 07-cv-9278 (KMK), 2008 WL 4525753 at N.5 (S.D.N.Y., September 30, 2008)("The courts within the Second Circuit indeed are split on whether the first- or last-served rule is the correct one." *Compare Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs.*, No. 04-CV-4991, 2004 WL 2360033, at *3 (S.D.N.Y. Oct. 19, 2004) (applying first-served rule); *Yang v. ELRAC, Inc.*, No. 03-CV-9224, 2004 WL 235208, at *1 (S.D.N.Y. Feb. 6, 2004) (same), and *Quinones v. Minority Bus Line Corp.*, No. 98-CV-7167, 1999 WL 225540, at *2 (S.D.N.Y. Apr. 19, 1999) (same), with *Buechner v. Avery*, No. 05-CV-2074, 2005 WL 3789110, at *3-4 (S.D.N.Y. July 8, 2005) (applying last-served rule); *Barnhart v. Federated Dep't Stores, Inc.*, 75 U.S.P.Q. 2d 1184 (S.D.N.Y. 2005) (same); *Fernandez v. Hale Trailer Brake & Wheel*, 332 F. Supp. 2d 621, 623 (S.D.N.Y.2004) (same); and, *Varela v. Flintlock Constr., Inc.*, 148 F. Supp. 2d 297, 300 (S.D.N.Y.2001) (same).

4. 3d Circuit: Undecided.

District Courts have interpreted this court's reasoning to indicate the last-served defendant rule would be followed. *See*: *Raju v. 315 Willow Ave. Condominium Ass'n*, Civil Action No. 07-3743 (PGS), 2008 WL 314561 (D.N.J. January 28, 2008)("When multiple defendants are served at different times, as in this case, the question arises as to the triggering of the statutory 30-day removal period. Some circuits follow the first-served rule, which triggers the 30-day period upon service of the first defendant, while others follow the last-served rule, in which defendants whose own removal periods have expired can consent to a later-served Defendant's removal notice. The Third Circuit has yet to weigh in on the question?") (emphasis added); *Cmiech v. Electrolux Home Prods., Inc.*, 520 F Supp.2d 671, 677 (M.D.Pa.2007)(adhering to last-served defendant rule).

Epstein v. Sensory Management Services, L.L.C., No. Civ. 05-CV-012-SM, 2007 WL 2702646 (D.N.J. Sept. 12, 2007) citing *Princeton* and finding the Intermediate Rule the appropriate rule in this case. *See also Orlick v. J.D. Carton & Son, Inc.*, 144 F.Supp.2d 337, 342 (D.N.J.2001) (" Indeed, the Third Circuit's opinion in *Foster v. Mutual Fire, Marine & Inland Insurance Company*, 986 F.2d at 48 (3d Cir. 1993), appears to forecast the Supreme Court's decision in *Murphy Brothers* in this respect. The Third Circuit's actions in *Foster* reinforce the conclusion that the Third Circuit would not adopt the 'first-served defendant rule', nor should this Court.").

5. 4th Circuit: "Intermediate Rule": Hybrid of First-Served Defendant Rule.

See McKinney v. Bd. of Trustees of Mayland Comm. College, 955 F.2d 924, 928 (4th Cir.1992) (in deciding whether a later-served defendant has 30 days in which to join in a timely petition for removal, filed by the first defendant, the court held that each later served defendant had 30 days in which to join a timely filed notice of removal filed by the first-served defendant). In *dicta*, however, that court stated: "In a different situation, where B is served more than 30 days after A is served, two timing issues can arise, and the law is settled as to each. First, if A petitions for removal within 30 days, the case may be removed, and B can either join in the petition or move for remand. Second, if A does not petition for removal within 30 days, the case may not be removed"); *Guyon v. Basso*, 403 F. Supp. 2d 502, 508-09 (E.D.Va.2005).

6. 5th Circuit: First-Served Defendant.

See Getty Oil Corp. v. Ins. Co. of N. America, 841 F.2d 1254, 1263 (5th Cir. 1988); A more recent case confirms this is still the rule in the 5th Circuit: *Snead v. Woodbine Prod. Corp.*, Civil Action No. 08-1301, 2008 WL 4610236 (W.D.La. Oct 11, 2008).

7. 6th Circuit: Last-Served Defendant.

See Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527 (6th Cir.1999), cert. denied, 528 U.S. 1076.

8. 7th Circuit: Officially undecided.

See, e.g., ***Bova v. U.S. Bank, N.A.***, 446 F. Supp. 2d 926 (S.D.Ill. 2006)(" In *Schillinger v. 360Networks USA, Inc.*, Civil No. 06-138-GPM, 2006 WL 1388876 (S.D.Ill. May 18, 2006), the Court observed that 'recent decisions of the United States Court of Appeals for the Seventh Circuit have somewhat ambiguously adopted the 'last-served defendant' rule'"); *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524 (7th Cir. 2004). Although a decision on this issue was premature in this case and required further findings by the district court. The court also noted that *Wright & Miller* recommends permitting a later-served defendant 30 days to remove, whereas *Moore's Federal Practice* recommends that the 30-day time limit should begin to run from service on the first defendant. *But see Ballard Nursing Center, Inc. v. GF Health Products, Inc.*, No. 07-C-5715 (N.D.Ill. Nov. 14, 2007)(deciding that the 7th Circuit did not adopt the later-served defendant rule, and that it agrees with the 5th Circuit's decision in *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir.1986) "that the first-served rule is the appropriate rule to use to resolve whether a removal is timely under Section 1446(b). Although a court must always be mindful of equitable concerns, the court should not solely focus on how defendants are prejudiced by the inability to remove an action. A court must also consider the plaintiffs that are prejudiced by such removals. They agreed with the Court in *Brown* that the last-served rule would prejudice a plaintiff and inhibit the efficient functioning of the judicial system by allowing defendants to forum shop and provide defendants with a means to needlessly delay an action, (noting that "[t]he forum for a suit ought to be settled at

some time early in the litigation").

9. 8th Circuit: Last-Served.

See Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P., 254 F.3d 753 (8th Cir. 2001).

10. 9th Circuit: Undecided.

See United Steel, Paper & Forestry, Rubber Manufacturing Energy, Allied, 549 F.3d 1204 (9th Cir. 2008). In cases with multiple defendants, there is a split in authority--unresolved in this Circuit--on whether the thirty-day period to file, or join in, a notice of removal begins to run on the day of service on the first-served or last-served defendant. *See United Computer Systems, Inc. v. AT & T Corp.*, 298 F.3d 756, 763 n. 4 (9th Cir.2002) (declining to adopt the first-served rule or the last-served rule) (emphasis added)

11. 10th Circuit: Undecided, but appears to be leaning to first-served defendant.

See, e.g, Cellport Systems, Inc. v. Peiker Acustic GMBH & Co. KG, 335 F. Supp. 2d 1131 (D.Colo. 2004); *Smith v. Time Ins. Co.*, No. 08-cv-00419-AEB-BNB, 2008 WL 4452147 (D.Colo. Sept. 30, 2008) (" Although the Tenth Circuit has not yet addressed this issue, at least three district courts in this district, including this one, have rejected the last-served defendant rule.") ; *Kedy v. Harris, N.S.*, 2008 WL 2673355, No. 07-cv-638-GKF-FHM (N.D.Okla., June 27, 2008)(" Under the 'first-served rule', in cases involving multiple defendants, the thirty-day time limit for removal commences for all defendants when service is accomplished on the first-served defendant.) *See also, Henderson v. Holmes*, 920 F. Supp. 1184, 1187-88 (D.Kan.1996); *Cellport Systems, Inc. v. Peiker Acoustic*, 335 F. Supp. 2d 1131, 1132-34 (D.Colo.2004); *Smola v. Trumbull Ins. Co.*, 317 F. Supp. 2d 1232, 1232-33 (D.Colo.2004); *Bachman v. Fred*

Meyer Stores, Inc., 402 F. Supp. 2d 1342 (D.Utah 2005); *Betts v. Larsen Intermodal Services,* Inc., Civil Action No. 05-0600-CG-C, 2006 WL 1748600 (S.D.Ala. June 21, 2006); *Air Starter Components, Inc. v. Molina,* 442 F. Supp. 2d 374 (S.D.Tex.2006). The "first-served rule" appears to be the majority rule. *Bachman,* 402 F. Supp. 2d at 1345. Contra: Last-Served Defendant: *Hartford Steam Boiler Inspection and Ins. Co. v. Riviera Elec. LLC*, No. 05-cv-01797-WYD-MEH, 2006 WL 1046962 (D.Colo. April 19, 2006).

12. 11th Circuit: Last-Served Defendant

Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1205 (11th Cir.2008)

The above survey certainly eviscerates Respondents' statement that the previously cited cases in Hill's Petition for Writ of Certiorari "hardly present the sort of compelling dilemma that warrants this Court's consideration on certiorari review." (OPP.BR. 7)

Respondents now raise the *Murphy Brothers* case. They heavily rely upon *Murphy* as precedent that has already resolved or given direction to the various Circuit Courts of Appeals. A reading of *Murphy Brothers* irrevocably demonstrates it had nothing to do with determining the issue raised by Hill's Petition. *Murphy* involved when the 30-day period starts in terms of service of process or notice by "receipt... or otherwise". 526 U.S. at 348-349. *Murphy Brothers* did not deal with the first served and/or last served defendant removal rule as a holding.

The only thing that makes *Murphy Brothers* remotely pertinent, in an indirect fashion, is the improper ruling that the Eleventh Circuit made in that case being similar to the improper ruling Hill contends in its Petition the Eleventh Circuit made in the subject case that in *Murphy Brothers* resulted in certiorari acceptance. The language from Justice Ginsberg that the Eleventh Circuit

in *Murphy Brothers*' improper decision, which was reversed because it opened "a universe of means besides service for putting the defendant in possession of complaint" and "what are the dimensions of that 'universe'", is also applicable to Hill's Petition. The Eleventh Circuit's holding herein that the last served defendant removal rule applied to a situation where the first served defendant removed the case, then it was remanded because of lack of opposition to a Motion for Remand, then a reconsideration was denied and the case was sent back jurisdictionally to the state court where it was first filed. That should have been the end of the "universe". Yet, the Eleventh Circuit created in the subject case a "universe" without telescopic boundaries or parameters. It allowed and sanctioned as part of the last served defendant rule, which rule itself should be rejected by this Court, a set of egregious facts that would not fall within the traditional concept of the last served defendant rule. After the subject case was already once removed then remanded to state court, a later served defendant, whose name was already at issue in the District Court before the remand, removed the case to federal court. Then the District Court improperly "reconsidered" its earlier decision and allowed the later served defendant to remove. In essence, we have here the first served and last served defendant rules both being adopted by the Eleventh Circuit implicitly, or at a minimum that the last served defendant rule basically has no limitations to it, similar to what *Murphy Brothers* referred to as the "universe" created without limitations or boundaries by the Eleventh Circuit for which this Court reversed. Other than this analogous semantical reference, *Murphy Brothers* certainly does not control this case involving Hill, or in any way undermines the strength of the Petition for Writ of Certiorari.

Finally, the Brief in Opposition cites no case in which the last served defendant rule has been interpreted to include a situation where the first served defendant removed and the case was remanded, regardless of the

reason, and then once the state court received back its jurisdiction, a later served defendant, but named in the same lawsuit of the operative Complaint in federal court, could later successfully remove the case to federal court once again. This is particularly true since the so-called last served defendant was the parent corporation of the first served defendants who removed the case initially. Additionally, the Eleventh Circuit permitted an even further expansion of the last served defendant rule in the subject case by allowing, against the case law, that even the District Court's earlier statement in its first remand that it did not have jurisdiction to "reconsider" such a remand, in fact then reconsidered its earlier decision to remand the case to state court after the second removal.

It is clear there is nothing in the opposition brief to undermine the persuasiveness of Hill's Petition, and the necessity of this Court to accept jurisdiction. There is no uniformity amongst the Circuit Courts of Appeals with regard to which Rule applies, the first named or the last named defendant to remove. Therefore, some Courts go one way, and other Circuit Courts go another resulting in conflict jurisdiction. Still other Circuit Courts of Appeals, as noted above, have even gone so far as adopting an intermediate rule from the first served defendant and last served defendant principles. Therefore, there is further lack of uniformity and conflict within the judicial Circuit Court regimen of decision-making. Finally, to even add further uncertainty, some Circuit Courts of Appeals, as noted above, have expressly decided <u>not</u> to decide the issue as to whether the first served defendant rule applied, or the last served defendant rule, or to create some amalgam between these two principles. Therefore District Courts within those Circuit Courts who have not made any decisions are in conflict intra-circuit-wise amongst varying district courts.

CONCLUSION

Respondents' Opposition Brief is unpersuasive. It is disingenuous in trying to persuade this Court there is no conflict amongst the Circuit Courts of Appeals, when in fact there is, without dispute. There is such a lack of uniformity not only between the circuits, but even within several of the Circuit Courts themselves. *Murphy Brothers* had nothing at all to do with, and is not controlling of the granting of Hill's position. Finally, even if this Court accepted jurisdiction and adopted uniformity of the last served defendant rule, the facts of the underlying case would still have to be reversed because of the improper "universe" without boundaries that it opens up in terms of the uncertainty added to the Rule for a case remanded on the operative Complaint which included the last served defendant, and where the District Court improperly "reconsidered" an earlier now out-of-time Motion to Remand back to state court. It is submitted this situation cries out for intervention by this Court to straighten out the mess the Eleventh Circuit created in its ruling in Hill's case, and the precedent it sets.

Respectfully submitted,

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